IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, 1981
S.O. 1981, c. 53, as amended; and

IN THE MATTER OF THE COMPLAINT OF Albert Large
AGAINST the Corporation of the City of Stratford,
the Stratford Police Department, and
the Board of Police Commissioners,
dated February 19, 1982, alleging
discrimination in employment on the basis of age.

BETWEEN:

ALBERT LARGE,
Complainant,

and

CORPORATION OF THE CITY OF STRATFORD,
STRATFORD POLICE DEPARTMENT, and
BOARD OF POLICE COMMISSIONERS,
Respondents,

and

ONTARIO HUMAN RIGHTS COMMISSION,
Commission.

BEFORE: Robert W. Kerr, Chair,
Board of Inquiry

APPEARANCES: Kim Twohig,
Ministry of the Attorney-General,
for the Commission.

John W.T. Judson,
Lerner & Associates,
for the Respondents.

THE FACTS

The Complainant was employed as police officer in the City of Stratford from 1967 until 1981, when he was retired in accordance with a policy of mandatory retirement at age-60. The policy did allow for a three-month extension of employment at the discretion of the employer. The Complainant applied for and was granted such an extension, and he retired under the policy at the end of this extension.

In a letter to the Police Commission at the time of his retirement, the Complainant indicated that he would have liked to continue his employment. Some time later, after consultation with officers of the Human Rights Commission, the Complainant sent a letter to the Police Commission requesting reinstatement in employment, but it took no action on this request.

The policy of mandatory retirement of police officers at age-60 for the Stratford Police force came into effect as a provision of the collective agreement between the Police Commission and the Stratford Police Association on January 1, 1976, replacing an age-65 retirement policy. Under the new policy, age-60 retirement applied to sworn officers, except those at the management level, but did not apply to civilians. Age-65 retirement continued to apply to management officers and civilian employees.

Prior to 1976, there appears to have been a lengthy dispute between the Police Commission and the Police Association with respect to retirement policy. The evidence before me of events leading up to the introduction of the mandatory retirement policy is incomplete. The positions of the Police Commission and the Police Association during this dispute are relevant to the rationale for the mandatory retirement policy, however, so it is important to sort out those events as far as the evidence will allow.

The earliest evidence on the record is the collective agreement for 1966-67. It contained no provision relating to pensions or retirement, leading to the conclusion that the policy at that time was governed by policies not dealt with by the collective agreement. The collective agreement did include an existing practices clause which presumably provided the police officers with some assurance of the continuation of pension and retirement policies.

From the minutes of a Police Association meeting on September 22, 1971, it appears that the Association's position in bargaining for the 1968 agreement included a demand for mandatory retirement at age-60. It seems clear that this demand was not agreed to by the Commission, but the 1968 collective agreement was not filed. This leaves it unclear as to what, if any, pension and retirement provisions were included in that agreement.

The next evidence on this matter is an arbitration award of August 17, 1971 settling the terms of the collective agreement for 1971. This award contained a "Pensions" provision which included the following clause:

> 22.02 The contributions to the plan shall be continued on the basis of compulsory retirement at age 60 for all members excepting civilian members.

This clause was followed by clause 22.03 under which the Police Commission would be required to fund supplementary pension benefits to provide a full pension to anyone who had completed 30 years of service by age-60.

While it was submitted on behalf of the Respondents that the age-60 mandatory retirement policy derived from the 1971 arbitration award, I cannot so find. The only language which might have been intended for this purpose was clause 22.02. The words "shall be continued", however, indicate that this provision pre-existed the award, whether it had been included in the collective agreement sometime between 1967 and 1971 or was derived from the existing practices. Consequently, I am not persuaded that the arbitration award in 1971 was responsible for the mandatory age-60 retirement policy.

In any event, it is clear that the Respondents did not introduce age-60 mandatory requirement as a direct consequence of the 1971 award. The policy did not come into effect until it was expressly dealt with by the collective agreement for 1976. Agreement in principle to this policy was apparently reached between the Police Commission and the Police Association around 1973, but implementation was deferred until 1976. This was done to allow certain officers over age-60 who did not qualify for a full pension to acquire additional years of service.

The conduct of the Police Commission between 1971 and 1976 is inconsistent with the view that it considered itself bound to age-60 mandatory retirement by the 1971 award. The position of the Police Commission at the time was presumably that the reference to "compulsory retirement" was intended solely to determine the basis for actuarial calculation of pension contributions and not as a directive to actually introduce mandatory retirement. In light of this, I do not see how the Respondents can rely on that award as establishing their rationale for mandatory retirement.

The initiative in favour of establishing age-65 mandatory retirement came from the Police Association. The evidence does not reveal with certainty when the Association first adopted this position. The minutes of the September 22, 1971 Association meeting indicate that the position existed at least as early as November, 1967.

Similarly, there is little evidence as to the rationale for the position of the Police Association on this issue. There was evidence that this position is shared generally by police associations in Ontario and by their provincial organization, but again there was no evidence as to how this position came into being.

The evidence did suggest there is a wide-spread belief among police officers that officers over age-60 cannot as a rule perform to an acceptable level. This belief is based in part on experience that the great majority of officers in fact choose to retire before age-60 and many of those retiring do so because they no longer feel able to continue with police work.

This view was also supported by the individual testimony of police officers who testified on behalf of the Respondents, including the Stratford Chief of Police. On the other hand, it was disputed by some police officers called as witnesses by the Commission. There was no evidence that the police organizations or officers favouring age-60 mandatory retirement had carried out or commissioned any scientific study of the question, although the publication of the provincial organization has carried some articles reporting on the safety aspects of the issue.

There was no evidence of the discussions between the Police Association and the Police Commission which led up to the actual adoption of the age-60 mandatory retirement policy in 1976. Neither was there any evidence of discussions of the policy within the Police Commission at the time or subsequently.

Leaving aside the question of what actually informed the decision of the Police Association to bargain for and the Police Commission to accept the age-60 mandatory retirement policy, other substantial, and predictably conflicting, evidence was introduced before me as to justification for age-60 retirement of police officers. This evidence is primarily of a medical nature and can conveniently be summarized under concerns related to the following areas: the cardiovascular system, the muscular system, the sensory system, mental functioning, and psychological reaction. There is some overlap between these areas, but it seems useful to deal with each separately.

With respect to the cardiovascular system, the evidence indicates there is an increasing risk of cardiovascular disease with age. The primary difficulty with such disease is that it can result unexpectedly in serious incapacity or sudden death which could compromise the performance of police duties in a crisis situation and, moreover, the crisis itself may be a factor inducing an incapacitating cardiovascular event. The only highly reliable method of diagnosing the presence of a cardiovascular condition that might result in such an event involves an invasive and somewhat risky testing procedure.

On the other hand, the actual proportion of the population suffering cardiovascular disease remains small during the age range from 60-65. The actual chance that an incapacitating event will occur in such a way and at such a time as to significantly impact on police operations is probably even smaller. Moreover, there are factors other than age which entail significant risks of cardiovascular disease, but there appears to have been no effort to control for any risk contributing to cardiovascular disease other than age.

With respect to the muscular system, there is evidence of an age related decline, both in terms of the physical condition of muscles and in the functioning of the energy-producing mechanism which enables the muscles to perform. There is evidence that, with proper exercise, there can be improvement in the capacity of the muscular system. Part of the problem for police officers is that they get insufficient exercise in their general duties to maintain fitness.

Evidence was introduced as to the actual limits of the human body's ability to perform physically as related to age. This involved measurement of the body's capacity to take in oxygen, referred to as aerobic capacity, which is necessary for any sustained physical activity. This evidence indicated that few, if any, sedentary individuals by age-60 have the aerobic capacity necessary to engage in some of the most physically demanding activities that police officers may be called upon to perform.

While aerobic capacity can be enhanced by regular exercise, this improvement is quickly lost if the exercise program is discontinued. The improvement is, in any event, relatively limited and may be off-set by factors such as exposure to heat and cold commonly experienced as normal weather conditions.

On the other hand, many individuals under age-60 may also lack the aerobic capacity necessary to perform some physically demanding police activities. In common with most police departments, the Stratford Police Department makes no regular effort to ensure that its officers are physically fit. There is also evidence that it is possible to test individuals for muscular and aerobic capacity, although the practicality and effectiveness of such tests are disputed.

With respect to the sensory system, there is a decline with age which, at least in the case of vision and hearing, may be important to the functioning of a police officer. Parts of this decline can be offset by corrective devices, although there are uncorrectable deficiencies that increase with age, such as decline in night vision. These deficiencies appear relevant to police work, but it is not clear to what extent they actually handicap a police officer.

With respect to mental functioning, there is evidence of age-related decline, at least with respect to reaction time and the ability to deal with new situations. The significance of this decline to the ability to perform police functions effectively is disputed, however. There is also some suggestion that the decline in mental capacity can be detected by appropriate tests, although it appears that not enough is known about the requirements of mental functioning for police work to allow such tests to be used effectively to determine individual capacity.

With respect to psychological reaction, the evidence is sharply conflicting as to whether age is negatively or positively correlated to the capacity to cope psychologically with police work over the long-term. This conflict suggests that the relationship is individualized, that is, the ability of some officers declines with age, as illustrated by what is known as burn-out; the ability of others increases; while others may experience no change.

To the extent that there appear to be declines in each of these areas related to age, the declines occur over an extended period of time. In some cases the decline appears, at least statistically, to commence at a relatively early age, perhaps even in the 20's. For others, it begins to appear during the late 40's or 50's. In few instances does there appear to be any marked change in the rate of decline during the age range particularly affected by an age-60 retirement policy. The concern about the capacity of 60-year-olds is, therefore, based as much on the cumulative effect of deficiencies developing prior to that age, rather than on any marked change in capacities at or about that particular age. In relation to most of these aspects, the decline appears to become significant at some age before age-55, and for some aspects it becomes significant during the 40's.

There is a dispute over whether the declines in capacity experienced with age are in fact caused by the aging process or can be explained by other causes. Whether the relation is causal or not, however, it does exist.

THE LAW

A preliminary question arose as to the law applicable to this case. The retirement of the Complainant occurred prior to the coming into force of the Human Rights Code, 1981. This Board of Inquiry was appointed under the 1981 statute which had been in effect for some years before the appointment of the Board in 1988. I ruled that, taking into account s. 14(2) of the Interpretation Act, R.S.O. 1980, c. 219, this Tribunal was correctly appointed under the 1981 statute and the procedural provisions of that statute were applicable, but that the substantive rights of the parties were governed by the previous Ontario Human Rights Code, R.S.O. 1980,

c. 340. Since the proceedings did not give rise to any procedural issues, citations to the Code will generally involve the 1980 law, but for clarity citations will specify the 1980 or 1981 statute, as the case may be.

The Respondents concede that the policy of age-60 mandatory retirement is a prima facie violation of the Code. The case of the Respondents, therefore, turns on the establishment of a bona fide occupational qualification and requirement under s. 4(6) of the 1980 statute.

The basic test of what constitutes a bona fide occupational qualification and/or requirement under Canadian human rights law was set out in Ontario Human Rights Commission v. Etobicoke, [1982] S.C.R. 202, at 208:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

This test involves two branches, commonly called the subjective and the objective branches. To be a bona fide occupational qualification and/or requirement, a limitation must pass both branches of the test, that is, it must be found to be both subjectively bona fide, taking into account the intentions of the respondent, and objectively reasonable, as viewed dispassionately by an independent tribunal.

In three recent cases dealing with similar provisions in the legislation of other provinces: Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279; Saskatoon (City) v. Saskatchewan (Human Rights Commission), [1989] 2 S.C.R. 1297; Alberta (Human Rights Commission) v. Central Alberta Dairy Pool (1990, not yet reported), the Supreme Court of Canada has indicated that a similar interpretation is to be applied even though the specific language of the statute may vary.

The emphasis is on an assessment of the reasonableness of the discriminatory requirement. This applies both to the view of the respondent as to the need for this requirement under the subjective branch of the test and the assessment of the requirement under the objective branch of the test: Saskatoon, at 1310. The objective

branch of the test involves a consideration of whether the requirement is rationally connected to the employment in question and whether it pursues that objective without an undue burden on those affected: Brossard, at 311-2. These considerations both enter into the assessment of the reasonableness of the requirement and do not constitute separate tests to be applied to the requirement: Central Alberta Dairy Pool. As Wilson, J. states in the last case:

> Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments.

The Central Alberta Dairy Pool throws new light on the relevancy of potential accommodation of the persons affected by the discriminatory requirement. In two earlier cases, Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561; Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, the Court held that there was no duty to accommodate a person excluded by reason of a bona fide occupational requirement since such a duty was not consistent with the existence of such a requirement, although a duty to accommodate might otherwise be implied under the legislation. The effect of applying a duty to accommodate in such a case would be to deprive the respondent of the benefit of the bona fide occupational requirement.

In Central Alberta Dairy Pool the majority overruled the reasoning in Bhinder against the duty to accommodate where the discrimination involves the adverse effect of a requirement, rather than discrimination based directly on a prohibited ground. In a case of a bona fide requirement having an adverse impact, the requirement is generally valid and is only potentially unlawful in its application to the group suffering the discriminatory effect. With respect to this group, therefore, it is only reasonable to accommodate as long as this can be done without undue hardship to the respondent since accommodation will not deprive the respondent of the full benefit of the requirement.

In the case of direct discrimination, on the other hand, the majority in Central Alberta Dairy Pool adhered to the ruling in Bhinder that a finding that a bona fide occupational requirement exists is inconsistent with a duty to accommodate. But it follows from this that, in the assessment of a bona fide occupational qualification or requirement, the question of reasonableness should include consideration of the possibility of accommodation. Otherwise, the victim of direct discrimination will be worse off than the victim of adverse impact discrimination since, while the latter has a right to reasonable accommodation after the requirement is found to be bona fide, the victim of direct discrimination would be altogether denied the possibility of accommodation even though it might be entirely reasonable.

This conclusion also flows from the incorporation of the question posed in Brossard, that is, whether an undue burden is placed on the person affected by the limitation, into the reasonableness standard, as mandated by the majority in Central Alberta Dairy Pool. If the limitation can be reasonably accommodated, the burden must surely be undue.

ANALYSIS OF THE CASE

The Subjective Test

In many of the cases involving bona fide occupational requirements since the Etobicoke decision, as well as in Etobicoke itself, the subjective branch of the test set out by the Supreme Court has been satisfied by a concession that the limitation was established in good faith. No such concession was made in this case. On the contrary, the Commission submitted that the Respondents had failed to provide any evidence as to their rationale in adopting the age-60 mandatory retirement rule and, hence, had not met the onus on them with respect to this branch of the test.

One question of legal interpretation arises with respect to the subjective branch of the test, that is, whether the elements of honesty, good faith and sincerely held belief, on the one hand, and absence of ulterior or extraneous reasons, on the other hand, are identical or separate. There was no evidence that the Respondents had any ulterior motive in adopting the age-60 mandatory rule. If these two elements are identical, therefore, the absence of ulterior motivation might be sufficient to satisfy the good faith requirement.

While there is no doubt a considerable overlap between these two elements of the subjective branch, I am not persuaded that an absence of ulterior or extraneous reasons is sufficient. A sincerely held belief in the need for a policy can hardly exist if a respondent has simply not addressed its mind to the issue, although it may be hard to show that this involved any ulterior motivation. There was, therefore, an onus on the Respondents to show that they actually had some rational basis for the policy.

The Respondents were perhaps under some handicap in leading evidence on this issue. It seems clear that the policy was adopted primarily in response to the demand from the Police Association. It is quite conceivable that the Police Commission acted solely on the basis of that demand and never deliberated on the underlying rationale. This would not preclude it from justifying the policy since its agreement with the Police Association would entitle it to adopt the rationale of the Association. It would mean, however, that the evidence necessary to satisfy the subjective branch of the test would be largely in the hands of the Police Association.

The witness in the best position to testify as to the rationale of the Police Association at the relevant time was the Complainant who was a leading member of its executive for much of the relevant period. The Respondents would naturally be hesitant about trying to introduce such evidence through cross-examination of the Complainant.

The lapse of time since the policy was introduced may also have made it difficult to obtain the necessary evidence. It was not strictly necessary to draw on evidence from the early 1970's when the policy was under discussion with the Police Association since, as ruled in Hope v. St. Catharines (1986), 9 C.H.R.R. D/4635 (Ont. Bd. of Inquiry), at D/4648, a new rationale may validate an already existing practice. To justify the policy for the purpose of this case, however, it was necessary to show that an appropriate rationale for the purpose of the subjective branch existed prior to the Complainant's retirement in 1981.

As noted in the review of the facts, there was no direct evidence of the rationale of either the Police Commission or the Police Association during the period when the age-60 mandatory retirement rule was under discussion or subsequently up to the date of the Complainant's retirement. The minutes of the Police Association general meetings for the period 1970 through 1973 were entered in evidence, but these throw no light on the rationale.

Two of the officers who were members of the force at the time, Hartung and Coe, were asked questions relating to the relevant period, but these questions were directed to showing the Complainant's personal support of the mandatory retirement policy at the time, rather than the Association's rationale. The responses do not assist with the latter.

Two other officers employed during that period, McFadden and Sharpe, were questioned as to their views on the mandatory retirement issue, but in both cases the questions related to their present view, rather than the rationale for adopting this policy during the 1970's. Other evidence on this issue, such as that of Chief Lawson, also related to recent views.

Evidence of current or recent views does not help to establish the rationale on which this policy was based prior to 1981, except to the extent that one may assume that such views have not changed over time. While this assumption might help to reinforce evidence pertaining to the views on which the mandatory retirement rule was based during the relevant period of the 1970's, I have some trouble reaching a conclusion as to the beliefs during the relevant period in the absence of any direct evidence relating to that period.

The Complainant did testify that one reason for the mandatory retirement policy was to ensure that the right of individuals to

retire voluntarily at age-60 was protected. This has some plausibility. The initial resistance of the Police Commission to voluntary age-60 retirement was such that it was certainly conceivable it might seek ways to pressure individuals into waiving the right to retire if the policy remained flexible. This rationale would not satisfy the subjective branch, however, since it does not relate to the performance of the work involved.

The record with respect to the subjective branch of the Etobicoke test is not only lacking in evidence of the actual rationale on which the policy was based at the relevant time, but it also includes a couple of factors which raise doubt as to the existence of a sincerely held belief by the Respondents in the need for the policy.

First, there is the fact that, upon originally agreeing to this policy, the Respondents declined to implement the policy until some officers already over age-60 had retired.. The reason for doing so was apparently compassionate consideration for the adequacy of the pensions of these individuals. If the Respondents were sincerely persuaded at last of the need for age-60 mandatory retirement after their years of resistance to this policy, one wonders why the delay. It would surely have been possible to provide compassion by purchasing additional retirement benefits for these individuals without prejudicing "the interests of the adequate performance of the job" by continuing to employ officers over age-60. This leaves open the inference that the Respondents were still less than convinced as to the need for the mandatory retirement policy.

Secondly, much was made of the fact that the Stratford Police are a small force so that any officer may be called upon to perform any police duty on occasion. It was conceded that this even applies to officers at the management level, that is, the Chief of Police and the Deputy Chief. These two positions have always been exempted from the age-60 retirement rule. This again casts doubt on the existence of a sincere belief as to the need for mandatory retirement to ensure adequate performance of the work involved.

I come to the conclusion, therefore, that the Respondents have failed to satisfy the onus upon them with respect to the subjective branch of the Etobicoke test. I reiterate that I do not find that they had any ulterior or extraneous reasons for adopting the age-60 retirement rule. Rather this is a case where there is simply a lack of evidence as to the rationale on which the discriminatory policy was based during the relevant time period. The Respondents have failed to show that during the relevant period of time they acted in a sincerely held belief that the age-60 mandatory retirement policy was imposed in the interests of the adequate performance of the work involved.

On the balance of probabilities, the likely explanation is that

the Respondents did not direct their minds to the rationale at that time. Otherwise, there would surely have been evidence that could have been adduced, notwithstanding the lapse of time.

At the same time, the evidence before me of more recent views as to the need for age-60 retirement of police officers may support a conclusion that the Respondents now possess the state of mind required under the subjective branch of the Etobicoke test. The exemption of management officers from the policy is still a potential problem, but there may well be a justification of this exemption which was not made clear to me.

In light of this, and given the extensive presentation before me of evidence with respect to the objective branch of the test, I think it appropriate for me to consider that aspect of the case as well.

The Objective Test

The Respondents placed considerable emphasis in argument on the need to consider the combination of the age-related declines referred to in the evidence, and cautioned about examining each of the areas of concern in isolation. For purposes of analysis, however, one cannot avoid separating these areas of concern, as the Respondents' own argument illustrated. I will proceed with this analysis first and return to the combination of factors at the end.

(a) Psychological, Sensory and Mental Factors

Only limited evidence was led with respect to the effect of aging upon ability of to cope with the stress of police work. The evidence was fairly evenly balanced with the result that it would not support discriminatory treatment based on any age relevant for the purposes of this case. In the end, the Respondents did not seriously endeavour to support the age-60 mandatory retirement rule on the basis of decline in ability to cope with stress and further consideration of this aspect is unnecessary.

While it is clear that there are general declines in sensory ability with age, it is also the case that many of the most important declines can be readily detected and corrected. This applies to many of the common defects of vision and hearing. There are some declines, such as with respect to night vision and ability to adjust to glare, that are not correctable. These declines seem relevant to police work as a matter of common sense. Much police work is conducted at night which involves both inadequate lighting and reliance on light sources that are likely to create glare. On the other hand, there is little scientific evidence on the real impact of such age-related deficiencies on the ability of police officers to perform successfully.

Similarly, while there is evidence of age-related declines in reaction time and the ability to deal with new situations, it is far from clear that this has a practical impact on police officers to perform within the relevant age range. Much was made of the inability to test police officers effectively for such declines since not enough is known about the actual cognitive requirements for police work. It would seem to follow from this reasoning, however, that the entire relevancy of such declines to police work is open to question.

In short, neither the evidence of decline in perception nor that of decline in mental processing of information persuade me to the conclusion that age-60 mandatory retirement is reasonably necessary for the adequate performance of police work.

(b) Cardiovascular Concerns

From a public safety perspective, the risk of cardiovascular disease provides perhaps the strongest support for mandatory retirement. While other factors may be stronger indicators of the risk of such disease at younger ages, age alone becomes the major predictive factor as age increases. If the disease manifests itself while a police officer is on duty and engaged in a dangerous situation, the potentially sudden incapacity of the officer could result in further harm to the officer, other police officers and members of the public.

The risk of cardiovascular disease satisfied several elements of the test for a bona fide occupational qualification and/or requirement. Because police work is on occasion highly dangerous and involves the public safety, as well as that of the police officers themselves, there is more reason to be cautious about incurring this risk than in the case of most occupations. Individual testing to determine the true risk for a particular person with any degree of accuracy involves expensive, intrusive, and even life-threatening procedures.

On the other hand, the absolute risk of a serious cardiac event incapacitating an officer over the age-60 while on duty and involved in a dangerous situation is small. The overall risk of a serious cardiac event for persons in the 60-65 age range is that approximately 11% will suffer such an event sometime during the next 6 years. The risk increases to that level steadily throughout the 40's and 50's.

This means that there is a risk for officers at those ages which differs in degree, but not in its nature, from the risk affecting those over age-60. Moreover, since most officers retire voluntarily before they pass age-60, the actual number of officers employed in the younger age ranges is much larger. This means that, in absolute terms, there is a larger risk that a serious cardiac event involving an officer under age-60 will occur while

on duty than that such an event will occur involving an officer over age-60.

Given that this risk exists and seems unavoidable, it is a close question whether the risk of such an event involving officers in the age range between 60 and 65 really justifies age discrimination against this group. Since it is impossible to eliminate the risk of cardiac events among police officers on duty, the question really becomes one of determining what is the acceptable level of risk.

This issue is a difficult one to decide on a purely objective basis. While any level of public safety risk might be viewed as unreasonable, once it is apparent that some risk is unavoidable, there is no obvious point at which to conclude that the risk is unreasonble.

With respect to this type of question, it might be helpful if the party responsible for the discriminatory requirement had actually addressed its mind to the rationale for the requirement. Where that party is responsible for making public policy decisions, as are the Respondents, the decision of that body, made after deliberation and in good faith, as to what is the level at which the risk becomes unacceptable could itself be highly persuasive of the reasonableness of that determination.

This difficulty in deciding whether the age-60 limitation is reasonable is compounded by the fact that the Respondents appear to have made no efforts to address the risk of cardiovascular disease as it involves other officers. This leaves doubt that this risk is the serious concern that the Respondents claim it is for the purposes of the age-60 mandatory retirement rule. I hasten to add that I am not suggesting that, to support the age-60 rule, the Respondents would have to adopt a similar drastic policy for other high risk groups. Other less drastic measures, for example, an anti-smoking campaign directed at the high risk group of smokers, might be enough to confirm that the this risk is seen as a serious impairment of ability to perform police duties.

There was also evidence that police officers who had suffered cardiac events were returned to duty. The risk of cardiac failure for such individuals is particularly high since it is clear that they do suffer from cardiac disease. Thus, such evidence undermines the view that it is reasonable to compel retirement at age-60 because of the risk of cardiovascular disease.

In the final analysis, I am left in doubt as to whether it is a reasonable limitation to single out persons at age-60 for mandatory retirement from police work because of the risk of cardiovascular disease. Since the onus is on the Respondents to justify the limitation as <u>bona fide</u> occupational qualification and/or requirement, this would compel me to find against the Respondents

on this issue on the record before me. On the other hand, if the age-60 limitation were supported by other evidence that the Respondents treated the risk of cardiovascular disease as significant to the performance of police work and the risk level for persons over age-60 was judged to be a critical one, I might reach a different conclusion.

(c) Muscle Condition and Aerobic Capacity

The evidence on age-related decline in general muscle condition was limited. It was not sufficiently linked to evidence of the requirements of police work to support the mandatory retirement rule.

The Respondents placed great weight on the evidence with respect to aerobic capacity in their submissions in argument. They argued that, even if one accepted the evidence of the Commission's expert on this issue, virtually no sedentary individual over age-60 had an aerobic capacity sufficient for the maximum requirements of police work. The evidence was clear that police officers are sedentary because a large part of police work does not entail a high level of physical activity.

This factor, like the risk of cardiovascular disease, satisfies several of the elements of the objective test of a bona fide occupational qualification and/or requirement. Since public safety is involved, the burden of establishing the reasonablness of the limitation is less than it might be for other occupations. Although the decline in aerobic capacity with age varies among individuals, and can be partially off-set on an individual basis by a program of fitness maintenance, the evidence indicates that by age-60 very few persons have the aerobic capacity for sustained activity of a kind that police officers sometimes need to perform.

The question of individual testing for aerobic capacity is a more difficult one. While testing does appear possible, a system of frequent testing would likely be expensive. Infrequent testing would be unreliable since fitness training could be used by officers to prepare for the test. While random testing might be a solution, such testing might raise serious questions of fairness.

Since the evidence is that virtually no persons over age-60 have the aerobic capacity to perform certain police work, it is not really necessary for me to resolve the delicate balance between the cost, inconvenience and other problems of such testing and the rights of those persons who might pass an individual test. While the occasional individual over age-60 might have the aerobic capacity desired, it is not reasonable to require an elaborate and problematic testing scheme for a handful of individuals when nearly everyone over age-60 would fail the test.

Similarly to the situation with respect to cardiovascular disease,

I do have some concern with the apparent lack of attention to the aerobic capacity of police officers under age-60. If aerobic capacity is of key relevance to police work, one wonders why there are not requirements that younger officers maintain fitness.

This is a less critical consideration in the case of aerobic capacity, however. In the case of the risk of cardiovascular disease, since the actual incidence of cardiovascular incapacity is small, I was looking for confirmation that the risk level in question was really significant. The likelihood that aerobic capacity of persons over age-60 is inadequate for some police work is so high, however, that no confirmation is needed that this is a significant matter.

This does not, however, conclude the matter. While the evidence indicates that persons over age-60 would lack the aerobic capacity for some police work, it is also evident that the activity in question is a relatively small part of police work. This raises a question as to whether mandatory retirement for police officers at age-60 on the basis of aerobic capacity is indeed reasonable.

The relevant evidence is found mainly in a report of the late Dr. Lind which was introduced in evidence by his associate, Dr. Williams. According to this evidence, most persons over age-60 lack the aerobic capacity for the following activities relevant to police work: walking at more than 4 m.p.h. in loose sand, walking at more than 2.5 m.p.h. in 12" of snow, running at 7 m.p.h. or more, scuba diving, boxing, judo, and wrestling.

The evidence also shows that a shortage of aerobic capacity manifests itself by the individual becoming exhausted and unable to continue the activity when the limit of aerobic capacity is reached. The evidence on testing, however, indicates that the effect is not instantaneous. Some period, albeit relatively short, of sustained activity is necessary before a person reaches the limits of aerobic capacity.

The limits of aerobic capacity were a key factor in the decision that age-60 mandatory retirement was a <u>bona fide</u> occupational requirement for firefighters in <u>Hope</u>, at D/4649-51. But the findings on which that decision was based reveal a key difference between the job requirements for firefighters and those for police officers relevant to the issue of aerobic capacity.

Although firefighters may spend a relatively small portion of their working hours in actually fighting fires, this activity is the primary purpose of their employment. The fighting of any serious fire will necessarily involve a period of sustained effort likely to test the limits of aerobic capacity. If a firefighter does not have the aerobic capacity necessary for this purpose, that person is unable to perform the essential requirements of the job. The risk of incapacity from exhaustion, moreover, makes it probable

that person could become a serious burden on fellow employees if engaged in firefighting.

While the most efficient operation of a police department may require the readiness of any officer to perform any aspect of police work at any time, the reality is that much of the essential work of police officers can be performed at levels of aerobic performance well within the capacity of persons over age-60. Of those police activities identified as requiring aerobic capacity greater than that of persons over age-60, I would note that there is no evidence before me that the Complainant was expected to engage in scuba diving or analogous activity. Thus, I do not consider the aerobic capacity required for that type of activity to be relevant.

With respect to the other activities requiring aerobic capacity greater than that of persons over age-60, police work in Statford does occasionally involve officers in physical combat that may be analogous to boxing, judo or wrestling. The evidence also indicates, however, that as a rule officers avoid such activity and rely on other techniques, such as back-up by other officers and the use of weapons, to avoid sustained hand-to-hand combat. As a consequence, actual physical combat is likely to be of short duration, making it doubtful that the point of exhaustion will be reached.

While Stratford police officers may be required to walk on loose sand or in deep snow, it seems unlikely that speed will ordinarily be of the essence on such occasions. There is evidence that officers are sometimes required to run, whether in pursuit of a suspect or to attend to an emergency, but this is infrequent.

In summary, the constraints on aerobic capacity for persons over age-60 will limit their ability to perform some police work. On the other hand, this will not prevent them from performing the great majority of police work. There is no equivalent to the central role of firefighting where constraints on the aerobic capacity of firefighters is critical. Moreover, there would appear less risk that a police officer who does become exhausted will become a burden on fellow officers, compared to the likelihood that an exhausted firefighter will require assistance from others.

I conclude that the constraint on the ability of persons over age-60 to perform some police work because of limited aerobic capacity is not sufficient to make age-60 mandatory retirement a reasonable limit, rather than an undue restraint on the rights of the individual. This is particularly so if, as I interpret the law, the possibility of reasonable accommodation is to be weighed in assessing the reasonableness of a discriminatory requirement under the objective branch of the Etobicoke test.

Given the small amount of police work actually affected by these

limits, it seems reasonable to expect the Respondents as employer to make alternative arrangements to cover situations in which the limits on aerobic capacity are likely to be a factor. There is evidence that other officers already make accommodation for those under age-60 who are not at the peak of fitness. It does not seem that similar arrangements for the few officers who chose to work beyond age-60 would be a significantly greater burden. I recognize that situations in which strenuous activity is necessary are unpredictable, but this is also the situation where accommodation is presently made for unfit officers under age-60.

The Respondents emphasized in their evidence that, as a relatively small police force, the Stratford Police did not have the flexibility to assign officers to desk jobs that would not require performance of the more physically demanding aspects of police work. I want to make it clear that I am not suggesting it is reasonable to expect the Respondents to accommodate older officers by creating such desk jobs. I believe the constraints on aerobic capacity could be accommodated by relatively minor adjustments of responsiblities, given that the great majority of police work is within the aerobic capacity of the average person beyond age-60.

As a consequence, I would not find mandatory retirement at age-60 to be a reasonable limitation relevant to the performance of the job of Stratford police officers based on aerobic capacity. An exclusion from continuing employment as a police officer on this basis is excessive, rather than reasonable.

(d) Combination of Factors

With the possible exception of the risk of cardiovascular disease, therefore, I am not persuaded that any of the areas of medical concern by itself can reasonably support an age-60 mandatory retirement rule. On the state of the evidence in this case, I am not persuaded that the risk of cardiovascular disease supports this requirement either. This leaves the question whether, even though none of these concerns by itself supports this requirement, the combination of age-related declines in these areas supports this mandatory retirement rule.

Except for the concerns over cardiovascular disease and aerobic capacity, the evidence really fails to show how the decline relates to the ability of a police officer to perform. This critical gap in the evidence cannot be filled merely by looking at these matters in combination.

On the other hand, there is some basis for supporting an age-60 mandatory retirement policy arising from the concerns as to cardiovascular disease and aerobic capacity. The import of the preceding review of these aspects is that, viewed separately and on the state of the evidence in this case, neither is sufficient to reasonably support an exclusion of persons over age-60 from

employment as police officers. Since each of these factors provides some basis for a mandatory retirement rule, the combination does strengthen that support.

Moreover, there is some compounding of this support because of the possible interrelationship between limited aerobic capacity and cardiovascular problems. There is the possibility that an older officer might attempt activity beyond the officer's aerobic capacity and thereby complicate any existing cardiovascular weakness.

I am still not persuaded that the combination of these factors is sufficient to make age-60 retirement a bona fide occupational qualification and requirement. Since the restriction in aerobic capacity can be reasonably accommodated, the possible compounding of limitations on aerobic capacity and cardiovascular disease is avoidable. The failure to address the risk of cardiovascular disease except in the case of those over age-60 leaves unanswered the excessiveness of an exclusion from employment to a particular group. Thus, the combination of these factors really does not change the conclusion that this restriction fails to satisfy the reasonableness test.

Summary

In conclusion, therefore, on the record before me, I would find that the age-60 manadatory retirement rule does not satisfy either the subjective branch or the objective branch of the Etobicoke test. The rule, admitted by the Respondents to be a prima facie violation of the Human Rights Code, has not been justified as a bona fide occupational qualification and/or requirement.

RETENTION OF JURISDICTION AS TO REMEDY

By agreement of the parties, the proceedings in this matter were split with evidence at the hearings to this stage being directed to the question of whether there was a violation of the Code, and not to the remedy in the event that I found there to be a violation. The matter was adjourned sine die, pending my decison on whether there as a violation. It is quite conceivable that the parties will be able to reach some agreement on the appropriate remedy. Consequently, I do not propose to initiate steps at this point to reconvene the proceedings. I leave it to the parties to apply to me in the event they are unable to reach agreement.

In this regard, I would note that, although the Complainant did not enter a formal appearance at the hearings, this does not diminish his status as a party. He, like the other parties, may apply to me if he wishes the hearings reconvened to settle the remedy.

Also, I do not believe it proper for me to attempt to retain jurisidiction for this purpose indefinitely. I think six months is an adequate period for the parties to either reach a settlement or come to the conclusion that they cannot resolve the remedy by agreement. Therefore, I will retain jurisdiction only for a period of six months from the date of this decision unless I receive an application to continue the hearings within that period.

DATED at Windsor, Ontario
21 November 1990

Robert W. Kerr
Board of Inquiry